

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-357

In re Applications of

PALMETTO
COMMUNICATIONS
COMPANY
WDIX, Yadkinville,
North Carolina

File No. BP-870331BK

For a Construction Permit
for a Modification of Facilities

TRIAD
NETWORK, INC.
Greensboro, North Carolina

File No. BP-870928AA

For a Construction Permit
for a New AM Station

MEMORANDUM OPINION AND ORDER

Adopted: January 8, 1992; Released: January 23, 1992

By the Commission: Commissioner Barrett not participating.

1. Before the Commission for consideration are an Application for Review and a Supplement thereto filed July 25 and August 19, 1991, respectively, by Triad Network, Inc. (Triad) and the law firm of Maupin Taylor Ellis & Adams, P.C. (MTE&A), and an Opposition to the Supplement filed August 26, 1991, by Palmetto Communications Company.¹ Triad and MTE&A seek review of a Review Board decision, *Palmetto Communications Company*, FCC 91R-62, released July 18, 1991, dismissing their appeal of a *Memorandum Opinion and Order*, FCC 91M-1929, released June 19, 1991, by Administrative Law Judge Edward J. Kuhlman (ALJ). The ALJ's order directed Triad's counsel and his law firm, MTE&A, to discontinue their representation of Triad in this proceeding. We will grant review and, for the reasons that follow, set aside the Board's and the ALJ's decisions.

BACKGROUND

2. The Board affirmed the ALJ's initial decision granting the above-captioned application of Palmetto Communications Company. *Palmetto Communications Company*, 6 FCC Rcd 1527 (1991), *affirming*, 5 FCC Rcd 5154 (1990). The Board, like the ALJ, found that Palmetto was entitled under 47 U.S.C. § 307(b) to a dispositive preference over Triad, as Palmetto would provide a first nighttime transmission service to its community of license, Yadkinville, North Carolina. Prior to the release of the Board's decision, however, Triad requested a reopening of the

record and an enlargement of hearing issues, alleging that Palmetto had concealed its true ownership structure and was thus unqualified to be a Commission licensee. In support of that request, Triad submitted an affidavit, dated March 22, 1991, from Robert C. Rickenbacker, Jr., wherein he stated that, even though he was listed as a partner in Palmetto's August 30, 1989 assignment application and had subsequently co-signed with William B. Hallman, Palmetto's other named partner, a promissory note for the purchase of the station on November 6, 1989,² he had withdrawn from the Palmetto partnership in early December 1989. He has had no ownership or other interest in that applicant since that time.

3. Relying on the above, and also noting that Palmetto's November 7, 1989, diversification and integration statement listed Rickenbacker and Hallman as each owning 50% of the general partnership, the Board set aside its earlier decision and remanded the proceeding to the ALJ to determine at hearing (1) whether Palmetto was lacking in candor and/or misrepresented facts concerning its ownership structure, and (2) whether it violated 47 C.F.R. § 1.65 by failing to report major changes in its ownership. *Palmetto Communications Company*, 6 FCC Rcd 2193 (1991). In doing so, the Board also observed that Palmetto had charged Triad's counsel with a patent conflict of interest, as he was representing simultaneously both Triad in this proceeding and Rickenbacker, a Palmetto principal, with respect to the latter's application for a new FM station in Bowman, South Carolina. The Board further observed that Palmetto also asserted that Triad's counsel had to have known in January 1991, when he became Rickenbacker's counsel in the Bowman proceeding, of the information upon which Triad relied in seeking to reopen the record in this case in March 1991, *i.e.*, Rickenbacker's purported withdrawal from the Palmetto partnership. The failure of counsel and Rickenbacker to come forth with this information earlier, Palmetto contended, was an abuse of the Commission's processes. Expressing its concerns as to these matters, the Board instructed the ALJ to compile a full and complete record. *Id.* at 2195 n.7.

4. Relying on the Board's n.7, *supra*, the ALJ thereafter ordered Triad's counsel either to withdraw or to show cause why he should not be disqualified. FCC 91M-1545 released May 3, 1991. Electing the latter course, counsel responded by claiming that his representation of Triad and Rickenbacker did not create a conflict of interest in this case. This was so, counsel maintained, because prior to the time in early 1991 that he agreed to represent Rickenbacker in the Bowman proceeding, Rickenbacker had informed counsel that he had severed all interests in the Palmetto partnership in late 1989. Given that representation, and having obtained the informed consent of Triad and Rickenbacker to represent both, counsel contended that his dual representation was therefore entirely proper and did not result in an impermissible conflict of interest.³ Response to Order to Show Cause filed May 10, 1991. Palmetto, in contrast, maintained that Rickenbacker was still a party-in-interest in Palmetto, as neither he nor counsel had shown what legal measures were taken by Rickenbacker to withdraw from the partnership. According to Palmetto, until such matters were finally resolved, it was apparent that counsel's dual representation of Triad and Rickenbacker posed a serious conflict of interest warranting counsel's removal. Comments on Response to Show Cause filed June 6, 1991.

5. By FCC 91M-1929, released June 19, the ALJ ordered counsel and MTE&A to withdraw their appearance in this case and further ordered Triad to obtain new counsel within 10 days. Based on the record before him, the ALJ concluded that Triad's counsel had not shown the absence of any conflict of interest due to his dual representation of both Triad and Rickenbacker. Rather, the ALJ noted that Palmetto had shown otherwise by demonstrating that Triad and Rickenbacker do in fact have adverse and conflicting interests, since the latter had been able earlier to impose his separate interests to the detriment of Triad by preventing a settlement of this case.

6. MTE&A then filed its appeal of the ALJ's ruling with the Board. Shortly thereafter, Triad retained new counsel, and MTE&A filed a notice of withdrawal as counsel for Triad. Because of these events, the Board subsequently dismissed the Triad/MTE&A appeal as moot. *Palmetto Communications Company, supra.*

DISCUSSION

7. We agree with Triad/MTE&A that the Board's dismissal of their appeal was improvident. We note that MTE&A's notice of withdrawal as counsel was specifically made subject to its appeal of the ALJ's ruling. Moreover, 47 C.F.R. § 1.301(a)(5) provides that an ALJ's ruling removing counsel is appealable as a matter of right by counsel on his own behalf or by his client. To hold, as the Board did, that retention of new counsel by the applicant automatically negates those appeal rights would, we believe, render meaningless § 1.301(a)(5). Accordingly, we shall set aside the Board's decision.

8. In a supplement to their application for review, Triad/MTE&A report that Rickenbacker has now retained new counsel to represent him in the Bowman proceeding in place of MTE&A and has entered into a settlement agreement for the dismissal of his application; that Rickenbacker's new counsel is also representing him individually in this proceeding; and that, in view of the foregoing, any conflict of interest MTE&A may have suffered as a result of its representation of Triad and Rickenbacker have now been removed. Supplement to Application for Review filed August 19, 1991. In light of these recent and significant developments, and in the absence of any showing that MTE&A's representation of Triad would now jeopardize the integrity of this proceeding, we will vacate the ALJ's ruling and allow MTE&A to resume its representation of Triad.

9. ACCORDINGLY, IT IS ORDERED, That the Board's decision, *Palmetto Communications Company*, FCC 91R-62, released July 18, 1991, and the ALJ's *Memo-randum Opinion and Order*, FCC 91M-1929, released June 19, 1991, ARE SET ASIDE.

10. IT IS FURTHER ORDERED, That, pursuant to 47 C.F.R. § 1.115(g), the Application for Review filed July 25, 1991, and the Supplements thereto filed August 19 and September 9, 1991, by Triad and MTE&A ARE GRANTED to the extent indicated herein and ARE DENIED in all other respects.

11. IT IS FURTHER ORDERED, That the Motion for Leave to file Supplement to Application for Review and Supplement filed September 9, 1991, by Triad and MTE&A, the Motion for Leave to file Third Supplement to Application for Review and Supplement filed September 12, 1991, by MTE&A, the Motion for Leave to file Fourth Supplement to Application for Review and Sup-

plement filed September 20, 1991, by MTE&A, the Motion for Leave to file Fifth Supplement to Application for Review and Supplement filed September 23, 1991, by MTE&A, and the Motion to Strike filed October 4, 1991, by MTE&A ARE DISMISSED as moot in view of the action here taken.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

¹ Also before us are a Motion for Leave to file Supplement to Application for Review and Supplement filed September 9, 1991, by Triad and MTE&A; a Motion for Leave to file Third Supplement to Application for Review and Supplement filed September 12, 1991, by MTE&A; an Opposition thereto filed September 18, 1991, by Palmetto Communications Company (Palmetto); a Motion for Leave to file Fourth Supplement to Application for Review and Supplement filed September 20, 1991, by MTE&A; an Opposition thereto filed September 24, 1991, by Palmetto; a Motion for Leave to file Fifth Supplement to Application for Review and Supplement filed September 25, 1991, by MTE&A; and a Motion to Strike Palmetto's Opposition of September 24, 1991, filed October 4, 1991, by MTE&A.

² Palmetto acquired Station WDIX from Childress Radio Company after Childress and Triad had filed competing applications for the license at issue in this proceeding. Upon the Commission's approval of its assignment application, the ALJ permitted Palmetto to succeed Childress in this case. FCC 89M-2822, released December 22, 1989.

³ In support of his showing, counsel relied on a March 1, 1991 letter to the Secretary of the FCC from Rickenbacker informing the Commission that he had never obtained an interest in Station WDIX, even though he and Hallman had filed: an application for the assignment of license for that station; affidavits from Rickenbacker wherein he states that he had severed all ties in the Palmetto partnership in early December 1989, and recounts the reasons why he did so; and an affidavit from a former employee of Station WDIX wherein the affiant states that she was informed in late 1989 by Hallman that Rickenbacker was no longer a partner in Palmetto.